

# Development Management Sub-Committee Report

**Wednesday 7 December 2022**

**Application for Planning Obligation  
146 Duddingston Road West, Duddingston, Edinburgh.**

**Proposal: Application under Section 75A for the Modification of Planning Obligations in relation to affordable housing to provide a commuted sum (As Amended).**

**Item – Other Item at Committee  
Application Number – 22/02723/OBL  
Ward – 00 - No Ward Number**

## **Reasons for Referral to Committee**

The application has been referred to the Development Management Sub-Committee because there are developer contributions with financial contributions over £250,000. Consequently, under the Council's Scheme of Delegation, the application must be determined by the Development Management Sub-Committee.

## **Recommendation**

It is recommended that this application be **accepted, and the agreement be modified** subject to the details below.

## **Summary**

The proposed commuted sum amount of £19,082 per unit meets the requirements of LDP Policy Hou 6 and the criteria set out in the Affordable Housing Guidance. The majority of the development relates to the conversion of listed buildings which do not lend themselves to onsite affordable housing provision. Housing Management and Development has considered the proposals and are satisfied with the information submitted and is confident that the commuted sum can be used within an agreed timeframe within the ward or an adjacent ward.

The modification to the planning obligation to provide a commuted sum is acceptable and the legal agreement can be modified.

## SECTION A – Application Background

The application site is the former Drybrough Brewery, which extends to around 0.8 hectares.

It sits to the west side of Duddingston Road West and to the south side of the South Suburban Railway Line. The area is of mixed use character. Across the railway to the north is a business park. To the west, south and east it is predominantly residential. The site is within walking distance of the Innocent Cycle Path, Duddingston Loch and Holyrood Park. Cairntows Park lies to the south. Further to the south is the Craigmillar/Niddrie local commercial centre.

The wider former brewery complex is now in business, industry and storage use. The former brewery buildings were B listed on 29 November 1988 (ref. 28699). They date from the latter part of the 19th century and include several ranges.

The existing buildings in the brewery complex are as follows:

- The Main Office Building and Tun Rooms are located on a north-south axis and bordering Duddingston Road West. These buildings are listed and are three storey stone built with a pitched slate roof. These buildings are currently in use as offices and retail.
- In the north east corner of the site is the Paddock Block which is a listed building. It is connected to the non listed Stable Block. These are single storey buildings with an attic currently in use as an office. There is currently a gap between the Tun Rooms and the Paddock Block.
- The Blue Bridge is a listed timber structure connected to the Main Office Building and Tun Rooms at upper levels to the Brewhouse. The Blue Bridge was used as a boxing club.
- The Brewhouse is a listed four storey stone structure with pitched slate roof with a high brick chimney. To the east of the Brewhouse is the Wellhouse, part of the original brewery and the Boiler House which is a modern building. These buildings are vacant.
- Parallel with the Brewhouse and the Wellhouse is a range containing the modern, metal clad Fermentation Block and the listed Maltings and the Kiln buildings which are four storey stone buildings with attic and pitched slate roof. These buildings are vacant. The yeast rooms are low, brick built, modern structures on the south elevation of the Fermentation Block.
- The Chimney within the site is also listed.

To the north of the application site is a joiner's yard that is part of the original brewery site but that is outwith the red line that defines the application site.

## **Description of the Proposal**

This application seeks to modify the planning obligation, made under the provisions of section 75 of the Town and Country Planning (Scotland) Act 1997, regarding affordable housing associated with planning permission 20/01340/FUL, which was itself a section 42 application to amend planning permission in principle (PPP) 18/07736/PPP. The original PPP was granted for the redevelopment of site, retaining the existing listed buildings, and converting to residential use and a mix of commercial uses and new build residential.

The application seeks to modify the Affordable Housing section from the Section 75 agreement to remove the onsite affordable housing requirement and provide a commuted sum as an alternative. The commuted sum would be paid in two staggered payments of half on completion of the 32nd residential unit and a further payment of half on completion of the 64th unit. With the payment to then be utilised within ten years.

## **Supporting Information**

- Supporting Statement and
- Financial Appraisal

These are available to view on Planning and Building Standards Online Services.

## **Relevant Site History**

18/07736/PPP

Unit 1 146 Duddingston Road West  
Edinburgh  
EH16 4AP

Redevelopment of site, retaining existing listed buildings, and converting to residential use whilst retaining current employment uses (classes 1, 4, and 11) but not necessarily in the same location as existing, and introducing a cafe/restaurant, (class 3) and new build residential. (As amended)

Granted

21 February 2020

20/01340/FUL

Unit 1 146 Duddingston Road West  
Edinburgh  
EH16 4AP

S42 application to amend conditions 1 and 7 of the planning permission in principle to allow greater flexibility with regards to the extent of the residential uses.

Granted

2 October 2020

21/01334/AMC

Unit 1 146 Duddingston Road West

Edinburgh

EH16 4AP

Application to approve matters (a-e) (h-m) (o-r) specified in condition 2 of planning permission in principle 18/07736/PPP as amended by 20/01340/FUL.

Approved

14 February 2022

### **Other Relevant Site History**

None

### **Pre-Application process**

Pre-application discussions took place on this application.

### **Consultation Engagement**

Housing Management and Development (Affordable Housing)

Refer to Appendix 1 for a summary of the consultation response.

### **Publicity and Public Engagement**

**Date of Neighbour Notification:** Not Applicable

**Date of Renotification of Neighbour Notification:** Not Applicable

**Press Publication Date(s):** Not Applicable;

**Site Notices Date(s):** Not Applicable;

**Number of Contributors:** 0

## **Section B - Assessment**

### **Determining Issues**

Section 75A(1)(a) of the Town and Country Planning (Scotland) Act 1997 states - A planning obligation may not be modified or discharged except, by agreement, between the planning authority and a person against whom that obligation is enforceable.

Section 25 of the Town and Country Planning (Scotland) Act 1997 requires that planning decisions, including the modification or discharge of a section 75 agreement, be made in accordance with the development plan, unless material considerations indicate otherwise.

In determining such an application for the modification or discharge of a planning obligation, the specific provision should be considered against the five policy tests set out in Planning Circular 3/2012. These tests relate to necessity, planning purpose, relationship to the proposed development, relationship to scale and kind and reasonableness.

## Assessment

To address these determining issues, it needs to be considered whether:

### a) the modification of the obligation is considered to be acceptable?

The Development Plan comprises the Strategic and Local Development Plans. The relevant Edinburgh Local Development Plan 2016 (LDP) policies to be considered are:

- LDP Strategy policy Del 1
- LDP Housing policy Hou 6

The non-statutory 'Affordable Housing Guidance (Updated May 2021)' and is a material consideration that is relevant when considering the proposal.

LDP Policy Del 1 (Developer contributions and infrastructure delivery) requires development to contribute to the specified infrastructure provision where relevant and necessary to mitigate any negative additional impact (either on an individual or cumulative basis) and where commensurate to the scale of the proposed development. In order to provide further detail on the approach to implementation of this policy and to provide the basis for future action programmes the policy states that Supplementary Guidance will be prepared to provide guidance on a number of matters including the required infrastructure in relation to specific sites and/or areas.

LDP Policy Hou 6 (Affordable Housing) states planning permission for residential development, including conversions, consisting of 12 or more units should include provision for affordable housing amounting to 25% of the total number of units proposed. For proposals of 20 or more dwellings, the provision should normally be on-site. Whenever practical, the affordable housing should be integrated with the market housing.

The supporting text to the policy states that the provision on an alternative site may be acceptable where the housing proposal is for less than 20 units or if there are exceptional circumstances.

The Affordable Housing Guidance sets out the criteria for when the payment of commuted sums in lieu of on-site provision will be acceptable. All the below should be met:

- There are exceptional reasons to avoid on-site provision, such as the site being poorly located for affordable provision, where conversions do not lend themselves to affordable provision, where it is evidenced to be unviable or unfeasible or where there are other advantages to the Council in accepting a commuted sum such as achieving more, higher quality or better-located affordable units elsewhere; and
- The Council is confident that that the commuted payments can be spent on providing affordable units within the same area of the city within ten years of the payment being made and
- The proposal is for less than 50 dwellings or is for a conversion.

The current section 75 agreement sets out in the Affordable Housing clauses the requirement for 25% of the total unit numbers to be affordable housing units. With various clauses in relation to the tenure, location, design standards and milestones.

Housing Management and Development (Affordable Housing) has reviewed the application. It notes that during the original application, the applicant entered into early dialogue with the Council in relation to the affordable housing contribution. Although the applicant has approached several Registered Social Landlords (RSLs) over a period of several years, it has not been able to agree a way to take forward the affordable housing on-site.

When considering the proposals against the above criteria in the guidance Housing Management and Development considered the reasons for why on-site affordable housing cannot be delivered.

The majority of the development relates to the conversion of listed buildings. Out of the 128 total residential units only 32 units are contained within newbuilds.

The conversion of listed buildings is unlikely to be able to meet accessible housing standards such as Housing for Varying Needs, which is one of the criteria for grant funding for affordable housing. This is also why listed buildings are a noted "reasonable exemption" from providing onsite affordable housing, as set out in national planning guidance; Planning Advice Note 2/2010 Affordable Housing.

Furthermore, the differences in ceiling heights for listed/older buildings and older, less efficient materials they are made of can mean they are unable to meet the required energy efficiency standards, which are also a condition of grant funding. Listed buildings usually have exterior materials and features which are more costly to manage, maintain and insure.

The average build cost of the homes is much higher than a RSL would be able to pay, with a difference of around £50,000 per home.

There are also a number of studio apartments throughout the development. As studio apartments do not receive grant funding, they are not viable for RSLs.

These above factors combine to provide a general acceptance that onsite affordable housing is not feasible, subject to a consideration of the financial implications.

Financial information has been submitted by the applicant. The information on costs has been independently verified. The District Valuer was instructed to calculate the commuted sum using the methodology set out in the Council's Affordable Housing guidance. Their recommendation is:

*The development of 128 units should provide for a commuted sum based on 32 affordable units, for a total payment of £610,624 equivalent to £19,082 per unit*

There is a substantial forward programme of affordable housing being taken forward across the city. The "Strategic Housing Investment Plan 2022-27", approved by Housing Committee in November 2021, sets out a programme of over 11,000 new affordable homes that could be taken forward over five years. Housing Management and Development is confident that a commuted sum could be used within the allowed timescales to support affordable housing in the same or an adjacent ward, as prescribed in Affordable Housing guidance.

Accordingly, Housing Management and Development support the District Valuers recommendation of a commuted sum totalling £610,624, subject to appropriate wording within the legal agreement. In this instance, and through discussion with the applicant, it is deemed that this would mean two staggered payments of £305,312 on completion of the 32nd residential unit and a further payment of £305,312 on completion of the 64th unit will be acceptable. The Housing Management and Development consultee response sets out recommended wording.

It is concluded that the proposed commuted sum meets the requirements of LDP Policy Hou 6 and the criteria set out in the Affordable Housing Guidance. The majority of the development relates to the conversion of listed buildings which do not lend themselves to on site affordable housing provision. Housing Management and Development has considered the proposals and are satisfied with the information submitted and is confident that the commuted sum can be used within an agreed timeframe within the ward or an adjacent ward.

#### **b) the proposal meets the tests of Circular 3/2012**

Scottish Government Circular 3/2012 (updated 18 November 2020) - Planning Obligations and Good Neighbour Agreements

The circular explains that obligations are to be promoted in strict compliance with the five policy tests. These tests relate to necessity; planning purpose; relationship to the development; scale and kind; and reasonableness.

##### Necessity:

In terms of the 'necessity' test, the planning obligation should be necessary to permit the proposed development. With a financial contribution a planning condition cannot be used.

The proposal seeks to modify an existing legal agreement to change the requirements for affordable housing to use a commuted sum. The use of a planning obligation for this matter continues to be required. The use of an obligation is appropriate, thereby satisfying the 'necessity' test.

##### Planning purpose:

The Circular states that planning authorities should satisfy themselves that an obligation is related to the use and development of land. This judgement should be rooted primarily in the development plan.

LDP Policy Hou 6 (Affordable Housing) sets out the parameters for assessing and requiring affordable housing whilst noting that provision should normally be on-site. The Affordable Housing Guidance provides further information on using the policy, including the circumstances for when a commuted sum will be acceptable. This test is met.

#### Relationship to the proposed development:

Planning obligations must relate to the development being proposed. There should be a clear link between the development and any mitigation offered as part of the developer's contribution.

The information provided justifies a commuted sum in this instance and relates to the specific details of the development.

#### Scale and kind:

In terms of the 'scale and kind' test, the Circular states that the planning obligation must be related in scale and kind to the proposed development.

The requirement for 25% affordable houses as part of the original application was acceptable in scale and kind and met the requirements of LDP Policy Hou 6.

The Circular does state that entering into an obligation can have financial consequences for developers and may make proposals uneconomic.

In this circumstance, the modification to provide a commuted sum in lieu of onsite affordable housing provision meets the scale and kind test as it is tailored to this specific development that seeks to convert a number of listed buildings on the site.

#### Reasonableness:

In terms of the 'reasonableness' test, the Circular provides a number of questions of which a negative answer to anyone would generally render a planning obligation inappropriate.

- (i) is an obligation, as opposed to conditions, necessary to enable a development to go ahead?
- (ii) in the case of financial payments, will these contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development in the near future?
- (iii) is the requirement in the obligation so directly related to the regulation of the proposed development that it should not be permitted without it?
- (iv) will the obligation mitigate the loss of, or the impact upon, any amenity or resource present on the site prior to the development?



Taking these questions in turn:

- i) Yes, the obligation cannot be secure through a condition.
- ii) Yes, the commuted sum would be utilised elsewhere in the area.
- iii) Yes, an obligation is required, or it fails the policy requirement for affordable housing.
- iv) Residential led mixed use development that converts a number of former industrial buildings. Affordable housing is required by the LDP.

The affordable housing policy is well established and in assessing the supporting information for the proposed commuted sum it is reasonable to take this approach.

The tests of the circular are met.

**c) There are any other material considerations which must be addressed?**

The following material planning considerations have been identified:

SPP - Sustainable development

Scottish Planning Policy (SPP) is a significant material consideration due to the LDP being over 5 years old. Paragraph 28 of SPP gives a presumption in favour of development which contributes to sustainable development. Paragraph 29 outlines the thirteen principles which should guide the assessment of sustainable development.

The proposal complies with Paragraph 29 of SPP.

Emerging policy context

The Revised Draft National Planning Framework 4 was laid before the Scottish Parliament on 08 November 2022 for approval. As it has not completed its parliamentary process, only limited weight can be attached to it as a material consideration in the determination of this application.

The Planning Committee considered the objections received to City Plan 2030 on 30th November 2022. At this time little weight can be attached to it as a material consideration in the determination of this application.

Equalities and human rights

Due regard has been given to section 149 of the Equalities Act 2010. No impacts have been identified.

Consideration has been given to human rights. No impacts have been identified through the assessment and no comments have been received in relation to human rights.

Public representations

None received.

## **Conclusion in relation to identified material considerations**

None of the identified material considerations outweigh the proposals compliance with the Development Plan.

## **Overall conclusion**

The proposed commuted sum amount of £19,082 per unit meets the requirements of LDP Policy Hou 6 and the criteria set out in the Affordable Housing Guidance. The majority of the development relates to the conversion of listed buildings which do not lend themselves to onsite affordable housing provision. Housing Management and Development has considered the proposals and are satisfied with the information submitted and is confident that the commuted sum can be used within an agreed timeframe within the ward or an adjacent ward.

The modification to the planning obligation to provide a commuted sum is acceptable and the legal agreement can be modified.

## **Section C - Conditions/Reasons/Informatives**

The recommendation is subject to the following: -

### **Informatives**

It should be noted that:

1. Please submit an engrossed Discharge or Minute of Variation (as appropriate) in accordance with the terms of this Decision Notice for execution and registration by the City of Edinburgh Council along with the required registration forms and registration fee. Submissions should be sent to The City of Edinburgh Council, Legal Services, 4 East Market Street, Edinburgh, EH8 8BG.

### **Background Reading/External References**

To view details of the application go to the [Planning Portal](#)

### **Further Information - Local Development Plan**

**Date Registered: 20 May 2022**

### **Drawing Numbers/Scheme**

01

Scheme 1

**David Givan**  
**Chief Planning Officer**  
**PLACE**  
**The City of Edinburgh Council**

Contact: Kenneth Bowes, Senior Planning officer  
E-mail: [kenneth.bowes@edinburgh.gov.uk](mailto:kenneth.bowes@edinburgh.gov.uk)

## Summary of Consultation Responses

NAME: Housing Management and Development (Affordable Housing)

COMMENT: The applicant seeks a variation to the Section 75 Legal Agreement to allow a commuted sum payment as the affordable housing contribution. This approach can be supported for the following reasons:

1. The development includes conversion of listed building.
2. Onsite affordable housing delivery is not viable due to high construction costs, and the inclusion of studio apartments which are not viable for RSLs.
3. The applicant has engaged in an open book assessment, and costings have been independently verified.
4. The District Valuer has provided a commuted sum value, calculated using the methodology set out in the Council's Affordable Housing Guidance.
5. With a strong programme of affordable housing being delivered across Edinburgh, Committee can be confident that the commuted sum could be used to support affordable housing delivery in the same or an adjacent ward.

We support the District Valuers recommendation of a commuted sum totalling £610,624. If Committee is minded to grant this change, we request that Section 3 of the legal agreement is replaced with text set out in Section 2.1 of this consultation response ("2.1 Revised Section 3 of the Section 75 Agreement") and that the relevant definitions are also updated/included.

DATE: 14 November 2022

The full consultation response can be viewed on the [Planning & Building Standards Portal](#).

## Location Plan

